Testimony of

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WITNESS STATEMENT

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My name is James P. Perry. I am a career civil servant, having retired from the Office of the General Counsel, U. S. Department of Agriculture on October 1, 1998, after more that 32 years of service. During that time I served as Deputy Assistant General Counsel for Forestry from 1980 to 1989, as Assistant General Counsel for Natural Resources from 1989 to 1995 and as Associate General Counsel for Natural Resources from 1995 until my retirement. In the latter two positions I headed the section of the Office of General Counsel which provided all natural resource program legal advice to the Forest Service and the Natural Resources Conservation Service.

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BACKGROUND

My career spanned many milestones in natural resources law including the passage of the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, the Monongahela (clear-cutting) litigation, the National Forest Management Act of 1976, promulgation of several versions of Forest Land Management Planning regulations, and the Northern Spotted Owl litigation just to name some of the highlights. During that time I had the duty and privilege of personally advising Chiefs John McGuire, Max Peterson, Dale Robertson, Jack Ward Thomas, Mike Dombeck and, prior to his appointment as Chief, Dale Bosworth.

During three decades as agency counsel I was in a unique position to witness many changes in the utilization and administration of our National Forests. At the time I joined the Office of the General Counsel in the late 1960s there were few legal challenges to Forest Service management policy for two closely related reasons. First, few organizations or individuals were found by the courts to have the legal right or legal standing to challenge agency decisions. Second, there was little statutory law to apply to Forest Service actions.

The National Forests were essentially administered under a two basic statutes, the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) and the Organic Act of 1897. MUSYA codified the management practices of the Forest Service over the previous decades, providing that the National Forests are established and shall be administered for "outdoor recreation, range, timber, watershed, and fish and wildlife purposes." Early judicial interpretations of MUSYA described the statute as "breathing discretion at every pore." Thus, there was little basis for a court to find that the Forest Service had failed to give "due consideration" to the resource decision at issue and federal courts generally accorded a degree of judicial deference to agency administrative expertise.

Beyond the broadly worded mandate of MUSYA, there was little law to apply to Forest Service management decisions. That situation began to change rapidly in the 1970s with the dramatic expansion in the number and complexity of the statutes which regulated the National Forest System. The result, primarily unintended, was an explosive growth in litigation challenging agency decisions.

The layering effect of multiple statutes designed to enhance some aspect of environmental quality combined with their gradual expansion by regulation and judicial decisions has rarely been analyzed. While some will insist that our

environmental laws work well together, it seems unlikely that statutes addressing such diverse topics as air quality, water quality, and wildlife, enacted in different decades with minimal cross reference would be fully integrated to avoid redundancy or to address statutory interactions and conflicts.

The broad language of NEPA and its implementing regulations has provided a basis for extensive and time consuming judicial review of administrative decisions by land management agencies. Likewise, one of the authors of the National Forest Management Act of 1976, Senator Hubert Humphrey, stated that the purpose of that Act was to get the Forest Service out of the courts. Instead, the numerous resource requirements of NFMA have been litigated extensively.

The expansion of judicial review for Forest Service activities has greatly hindered the agency from proceeding in timely fashion with management initiatives and prevented or delayed many projects, including those which are environmentally beneficial. In addition to the substantial costs of defending litigation, the cost of preparing many projects with the expectation of extensive administrative appeals followed by litigation undoubtedly dissuades local managers from undertaking worthwhile projects due to budget concerns. I could cite numerous examples of appeal and litigation abuse such as announcements by some groups of an intent to appeal all future timber sales and the filing of at least nine appeals to the 9th Circuit Court of Appeals by plaintiffs in litigation involving the Mt. Graham Red Squirrel.

I commend this committee for its efforts to improve the body of laws protecting the environment. With a shared understanding that the goal is to improve public land management without weakening environmental protections, I am hopeful that all interest groups will see the benefits of harmonizing and simplifying existing statutes.

RECOMMENDATIONS

Congress Should Review the Current Status of Project, Forest Plan and Multi-Forest NEPA Compliance

I recall the enactment of the National Environmental Policy Act of 1969. The contemporaneous understanding at the date of passage was that federal agencies should prepare EISs of about 15 pages in length. Through development of regulations, agency practice and judicial decisions EISs now run hundreds of pages. While NEPA may have improved the environmental decision making of many federal agencies, NEPA is primarily a procedural statute and not a mechanism for policy determinations. In recent years the Forest Service has become the largest producer of EISs in the federal government, accounting for roughly one forth the national total. Further, the Forest Service prepares hundreds of Environmental Assessments (EAs) annually, many of which run roughly 100 pages in length. Computers now generate boilerplate EISs, which are considered necessary to respond to computer generated public comments, appeals, and lawsuits.

Preparation of these environmental documents involves a substantial commitment of Forest Service staff and budget resources. Broad scale and costly Forest Plan and larger programmatic EISs overlap project EISs and EAs, much of material being repetitive in nature. Particular scrutiny should be given to the appropriate role of the Forest plan EIS in order to efficiently utilize available resources. After careful study Congress should consider conforming NEPA to better serve the administrative functions of a land management agency under a statutory scheme designed to avoid repetitive analysis at significant cost but little benefit. Simply put, if the Forest Service is to be funded to continue the comprehensive and interdisciplinary Forest Planning process with its extensive public involvement and supporting EIS, the resulting product must be deemed statutorily sufficient to meet NEPA for all actions conforming with the plan or, at a minimum, significant limitations should be placed on additional analysis.

Congress Should Review the Extent to which Other Laws Have Impeded the Management of the National Forests for Multiple Use Purposes

Congress has followed a consistent and logical path in its management direction over the century, first providing successively for protection (Organic Act of 1897), general management standards (MUSYA of 1960) and ultimately comprehensive land management planning (NFMA of 1976). Second, Congress has delegated to the Forest Service the broad latitude to determine which combination of uses under the Multiple-Use Sustained-Yield mandate best meet the needs of the public. Third, Congress expects such multiple use decisions to be guided by input received in the very public land management planning process.

The ability of the Forest Service to continue its legacy of wise and balanced management of public lands has been placed at risk by a number of factors, especially the rapid development of private lands. From the panhandle of Florida to the upper piedmont of South Carolina, the desert southwest and the intermountain west, the story is the same. Explosive commercial growth is coupled with sprawling private home development. I understand that a Forest Service study released in the past few weeks on forests land status in the southeastern United States details this problem. The loss of undeveloped land has resulted in increasingly stringent restrictions on National Forest System lands designed to protect individual wildlife species, many of which are listed species under the ESA. Inflexible by statutory construction, the ESA has dictated land management decisions on millions of acres.

In the Pacific Northwest National Forest lands are expected to support surviving populations of the Northern Spotted Owl, yet there is relatively little restriction of private or state lands. The same is true of the Red Cockaded Woodpecker in the southeast. Further, many of the same National Forests supporting the Owl are also under restriction to support salmon populations listed under the ESA. In each case the demise of the species was not the primary result of activities on the National Forests. General land development coupled with timber harvesting on private, state and BLM's "O and C" lands far exceeded the impacts of harvesting on the National Forests in the case of the Northern Spotted Owl. Over fishing, timber harvesting and particularly dam construction have vastly reduced many species of salmon. Nevertheless, rather than seeking a broad remedy, there has been a misallocation of the burden of species protection to the National Forests.

Some have referred to broad scale plans to protect individual species as outstanding examples of "ecosystem management". I disagree. I have had the opportunity to review the work of Forest Service scientist Dr. Robert Bailey who developed an ecosystem map for the whole of the nation, an 8" by 11" copy of which is included as an attachment to my testimony. In Forest Service Miscellaneous Publication No. 1391 entitled *Description of the Ecoregions of the United States (1996)* compiled by Dr. Bailey, the ecoregions depicted tended to follow landforms, climate, soil, vegetative types and fauna. However, when the broad scale management prescriptions dictated by the ESA for various individual species located on National Forest System lands are placed as overlays to the ecoregions described by Dr. Bailey, one observes little, if any, correlation. In other words, the one size fits all management direction for single species protection seems to ignore the very basis of ecosystem integrity.

Dr. Bailey has also prepared a map overlaying individual National Forests on an ecoregion map which I am providing to the Committee along with a copy of Publication No. 1391.

Let me be clear that I strongly support the goals of the ESA. However, the time has come to study and revise the ESA to encompass more tools and greater flexibility for species preservation. Relying solely on the path of least resistance----the conversion of National Forests at their random locations to narrow management goals will likely not suffice in the long term to adequately protect many endangered species. Congress should address the conversion of multiple use lands to limited use resulting from undue reliance on the National Forests for ESA purposes.

CEQ Should Develop Regulations For All Federal Agencies Harmonizing Environmental Statutes

Under the National Environmental Policy Act of 1969, the Council of Environmental Quality (CEQ) is charged in Section 204 with the responsibility "to review and appraise the various programs and activities of the Federal Government" and "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality."

Implementing regulations for the National Environmental Policy Act were promulgated in 1978 and may be found at 40 CFR Parts 1500-1508. These regulations were well drafted, have withstood the test of time and continue to provide a firm base for the implementation and interpretation of the Act. However, with a quarter of a century of experience for guidance, the enactment and amendment of numerous other environmental laws and the development of case law on environmental statutes it should come as no surprise that there is now a definitive need to supplement CEQ's existing regulations.

CEQ should be requested to address opportunities for harmonizing the procedural aspects of the nation's environmental statutes for all federal agencies and to develop uniform requirements for coordination of NEPA, ESA, the Clean Air Act, the Clean Water Act and other principal statutes. Many issues can be addressed by federal regulations which should be

accorded deference by federal courts. However, should CEQ determine after careful study that the effective and efficient coordination of the multitude of environmental statutes exceeds its regulatory authority, CEQ is authorized under Section 201 of NEPA to make recommendations for legislation.

CEQ Should Develop Supplemental Regulations Addressing the Particular Problems of Federal Land Management Agencies

Federal land management agencies are faced with unique difficulties far greater than those federal agencies that merely fund projects in complying with NEPA, ESA and other environmental statutes. A classic example is that NEPA is drafted principally to apply to a site-specific project at a single point in time rather than to encompass the responsibilities of land management administering vast acreages over decades. Virtually every management action arguably requires NEPA compliance and may require revision of NEPA analysis already performed for on going activities. Attempts to address ecosystem problems involving multiple National Forests and numerous wildlife species increases the risk that evolving scientific information will invalidate the premises on which the NEPA analysis was based, thereby exposing the land management agency to the possibility of an injunction covering thousands of acres. The Forest Service attempted four EISs before passing judicial muster on the protection of the Northern Spotted Owl. The greatest difficulty faced by the agency was the continually evolving scientific opinion on protective requirements for the owl which outdated the detailed NFMA and NEPA processes before they could be completed.

Further, compliance with one environmental statute may place the federal agency in violation of another. A constant tension exits for land management agencies in the interface between NEPA, ESA and NFMA in the case of the Forest Service. A common predicament for the Forest Service is that the implementation of wildlife protection measures in compliance with ESA may require amendment or revision of NFMA plans and supporting NEPA compliance, a process which requires months to complete.

The rebalancing of multiple use activities resulting from the revision of forest plans precipitated by ESA protections may affect some of the assumptions on which ESA protections of the same or other species were based. Likewise the updating of forest plans now passing the 15 year life established by NFMA may trigger new or revised ESA protective requirements. One federal land management agency, faced with the same complexities, once argued in federal court that no ESA protections could be implemented until NEPA compliance was completed. Supplemental CEQ regulations are needed to address problems unique to the Forest Service, the Bureau of Land Management and other land management agencies. Again, should CEQ determine that regulatory remedies are inadequate, legislation can be recommended.

Congress Should Review the Cumulative Effects of Multiple Public Involvement Statutes in order to Streamline Process and Eliminate Duplication

There is no dispute that public involvement substantially improves the quality of agency land management decisions and develops public support and understanding of forest management. Congress provided for comprehensive public involvement in the development of forest plans in the National Forest Management Act of 1976. By terms of NFMA, plans are to be developed by an interdisciplinary team, made available to the public three months in advance, and the Secretary is to provide for public meetings and other measures that foster public participation, to list only some of the public involvement required.

Further, in a partially redundant requirement, Section 6 of NFMA requires that land management plans are to be developed in accordance with the National Environmental Policy Act which has resulted in the preparation of an Environmental Impact Statement for each forest plan. In addition to a comprehensive EIS on the Forest Plan, the agency has also found it necessary in order to pass judicial muster to prepare individual EISs and EAs on many projects to be carried out in the planning area, together with EIS's on multi-forest initiatives. Implementation of protective measures for species listed as endangered under the ESA also generally requires amendment or revision of EISs on multiple Forests. Broad scale natural disasters, fires, new scientific information or the listing of an Endangered Species may suddenly outdate forest plans and supporting EISs.

In obtaining regular advice and public input from local or national organizations in a collaborative fashion, the Forest Service is well advised to comply with the any procedural and notice requirements of the Federal Advisory Committee Act. In addition, the Forest Service has historically provided the public with a relatively formalized administrative appeal

process, certain elements of which are now a statutory requirement. Of course, following the exhaustion of administrative remedies, full judicial review of policy decisions made with extensive public input is available.

This combination of all of the above aspects of public notice and involvement, planning and analysis, administrative appeal and judicial review for virtually every project or activity on the National Forests results from an unfortunate layering of individually worthwhile statutes. Too much of a good thing has led to a waste of public resources and agency paralysis. The recent proposal of the Forest Service to shorten the administrative appeal process on the treatment of fire damaged timber on the Bitterroot National Forest is a prime example of an attempt by the agency to cut through a multi-layered public involvement process which impedes timely resource management activities.

Currently there seems to be great interest in "collaborative" public process. Legislative adoption of some form of collaborative process should be considered only if some existing forms of public involvement are dropped. Each type of public process has its dedicated constituency, thus it is a task for Congress to design efficient public process by selecting some, but not all, forms of public involvement. Options include a simplification of the planning process, the restriction or elimination of the administrative appeal process and a narrowing of the scope of judicial review.

Forest Planning Demands Simplification Before Expenditure of Public Funds on Another Round of Land Management Plans.

Over fifty Forest plans are now beyond the 15 year statutory limit imposed by NFMA at 16 U.S.C. 1604(f)(5). A legal morass awaits challenged project actions on overdue plans. Recently promulgated planning regulations are unduly complicated, confusing and far exceed the administrative capability of the Forest Service as currently staffed and funded.

The agency needs legislative relief in the form of a moratorium, for which there is precedent, to complete updated forest plans. Equally important the Forest Service must recognize that the planning process must be vastly simplified to conform to its limited staff and budget.

I suggest that the Committee obtain a current report from the Forest Service on the status of the Land and Resource Management Plan on each Forest including the projected date of completion of the second generation plan together with an estimate of the cost of completing the plan and EIS under the current regulation. I believe this data will graphically demonstrate the need for a prompt overhaul and simplification of the planning process by displaying a disconnect between the agency budget, the resources necessary to complete the planning process and the relative benefits of generating an excessively expensive planning document which will do little to improve environmental quality, forest management or to provide services to the public.

The Forest Service Should Undertake a Comprehensive Review of its Regulations and Policies Beginning with the Land and Resource Planning Regulations with the Objective of Vastly Reducing its Administrative Requirements.

From its inception the Forest Service has been one of the finest administrative agencies in the federal government. However, in the agency's zeal and dedication to the highest standards of land management it has often promulgated regulations and policies that establish goals which are extremely difficult to attain. Judicial decisions have often tended to treat these goals as mandatory rather than policy objectives.

A ready example may be found in the initial version of land and resource planning regulations in which the Forest Service expansively translated the NFMA direction to develop guidelines to achieve the goal of providing "diversity of plant and animal communities" for the purpose of meeting multiple use objectives into a requirement to maintain the "viability" of all vertebrate species. This most laudable objective has been judicially interpreted by some courts to require extensive protective requirements and development of species population data which are beyond the practical capability of the agency. This is not to suggest that the Forest Service should retreat from its efforts to protect wildlife values, but simply avoid turning goals into mandatory legal requirements which promote litigation.

The Forest Service should be directed to review, scale back and simplify the many self-imposed administrative burdens which have accumulated over the years in its land and resource planning regulations, administrative appeal procedures and other management activities to reflect more accurately the current staffing and capabilities of the agency. I

understand that Chief Bosworth has initiated such a review. It may be that cost estimates of various elements of current regulatory requirements would be helpful in this endeavor and that Congressional direction will ultimately be necessary to prune excess procedures which have become well accepted.

CONCLUSION

One final observation---many citizens of varying persuasions have recognized the need to streamline National Forest System management. I question whether mere tinkering with the National Forest Management Act would suffice to substantially improve the process. Some mechanism must be found to integrate the many environmental statutes which vitally affect the planning process, principally the National Environmental Policy Act and the Endangered Species Act. Without a unified approach, the agency will forever be unable to meet its statutory duties under those acts in a timely and cost effective manner. Further, both the Forest Service and the Congress must act to radically simplify management direction.

With little progress having been made recently on the legislative front, perhaps it is time to consider an approach similar to the Public Land Law Review Commission to build a base of public understanding and compromise on future legislation while assuaging the concern felt by some that review and revision may result in the loss of environmental protections

Thank you for this opportunity to testify.